BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL - 7 1992

Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Billed Party Preference	)	CC Docket No. 92-77
for 0+ InterLATA Calls	)	

ORIGINAL FILE

COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

CAPITAL NETWORK SYSTEM, INC.

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TABLE OF CONTENTS

SUMMARY ii

I. INTRODUCTION 1

II. "800," "950," AND "10XXX" ACCESS MAKE BILLED PARTY PREFERENCE UNNECESSARY 4

III. A DECISION BY THE FCC TO REQUIRE BILLED PARTY PREFERENCE WOULD BE ARBITRARY AND CAPRICIOUS 5

IV. A DECISION BY THE FCC TO MANDATE BILLED PARTY PREFERENCE COULD BE AN UNCONSTITUTIONAL TAKING 12

V. IMPLEMENTING BILLED PARTY PREFERENCE WOULD BE INCONSISTENT WITH THE ADMINISTRATION'S RECENT INITIATIVES AGAINST UNNECESSARY REGULATION . . . 16

VI. IMPLEMENTING BILLED PARTY PREFERENCE COULD HAVE A DEVASTATING IMPACT ON THE COMPETITIVE "0+" MARKET . . . 18

VII. CONCLUSION 23

SUMMARY

Billed party preference is unnecessary, anti-consumer, unlawful, and anticompetitive, and its implementation would be contrary to the Administration's and the FCC's own policies. Because of the Commission's unblocking requirements, callers (who are also generally the billed parties) can access their preferred carriers through "800" and "950" access, and increasingly through "10XXX" access as well. Thus, there is no need for billed party preference, particularly in light of its extraordinary costs and negligible benefits.

Based on the evidence, billed party preference cannot be cost justified. Although perhaps facially attractive, on closer examination it becomes clear that billed party preference would result in slower and significantly more expensive operator services. AT&T has estimated that implementation costs alone would exceed half a billion dollars. Once the system is installed, persons placing interexchange collect, third-party billed, and credit card calls would have to communicate with two live operators to have their calls completed. This extra routing step would result in more than 1.55 billion otherwise unnecessary "0-" transfers per year from LEC operators -- at an annual cost to consumers of more than $540 million. Besides higher costs, implementation of a billed party preference system also raises serious network reliability concerns. Given this record, a Commission decision to order implementation of billed party preference would be arbitrary and capricious agency action in violation of the Administrative Procedure Act. Moreover, if such a system were implemented without compensating aggregators and private payphone operators for the use of their equipment, this could constitute a unconstitutional "taking" in violation of the Fifth Amendment.

Furthermore, billed party preference should not be instituted because it is completely contradictory to important Administration and Commission regulatory initiatives. Its implementation would be fundamentally inconsistent with President Bush's campaign to eliminate unnecessary and burdensome regulations. Similarly, implementation would run counter to the FCC's own pledge to subject major decisions to rigorous cost/benefit analyses. Instituting billed party preference would also undermine the Commission's laudable goal of attracting new entrants and entrepreneurship to the telecommunications industry.

Finally, billed party preference would have a profoundly anticompetitive impact on the provision of telecommunications services in this country. Innovative, regional carriers could be eliminated from the "0+" market because they would not have the resources necessary to issue calling cards or operate on a nationwide basis -- both vital requirements for success in a billed party preference

environment. Not only could regional OSPs be eliminated, but their regional "1+" counterparts could likewise be eliminated. As a result, billed party preference would substantially decrease competition in both the "0+" and "1+" markets and could lead to the elimination of interexchange carriers except for AT&T, MCI, and Sprint -- a result that would clearly be contrary to the public interest.

In sum, the Commission should not implement billed party preference because callers can already reach their preferred carriers easily, because its negligible benefits do not support its enormous implementation and operating costs, because it would be unlawful and likely unconstitutional, because it would be fundamentally incompatible with Administration regulatory initiatives, and because it would eliminate competition within both the "1+" and "0+" interexchange markets.

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COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

Capital Network System, Inc. ("CNS"), by its undersigned attorneys, hereby submits its comments on the Notice of Proposed Rulemaking issued in the above-captioned proceeding concerning billed party preference routing of all "0+" interLATA calls. [1/]

I. INTRODUCTION

1. CNS is an interexchange carrier ("IXC") headquartered in Austin, Texas. Founded in 1988, CNS's primary business is the provision of operator-assisted calling services. By providing high quality, innovative services to the public, CNS has created hundreds of new jobs. In 1991, CNS was honored as "Employer of the Year" by the Texas Commission for the Blind because of its "development of career opportunities for Texans who are blind or visually impaired."

2. Since CNS was founded, it has worked long and hard to try to lower its costs -- and therefore to be able to lower its rates -- by, inter alia, seeking the elimination of anticompetitive regulations and business practices that favor

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1/ Billed Party Preference for 0+ InterLATA Calls, 7 FCC Rcd 3027 (1992) ("Notice").

dominant carriers at the expense of the public and of smaller, innovative carriers. [2] CNS has actively participated in previous Commission proceedings involving billed party preference issues, including filing several rounds of comments opposing the Petition for Rulemaking of the Bell Atlantic Telephone Companies ("Bell Atlantic"). [3] In addition, CNS filed a response last winter to a Bell Atlantic Motion regarding billed party preference that was submitted to the court administering the Modification of Final Judgment. [4]

3. As explained below, although a billed party preference system might superficially appear to be in the public interest, in reality such a system would be anti-consumer and anticompetitive. This is because billed party preference would impose substantial new costs on carriers (e.g., costs of more than $500 million per year, in addition to hundreds of millions of dollars in "start-up" costs) and result in significantly

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[2] See CNS's Comments submitted in CC Docket No. 92-77 regarding the "0+" public domain proposal (filed June 2, 1992) at 3-7 ("92-77, Part 1 Comments").

[3] See, e.g., CNS Reply Comments to Bell Atlantic's Petition for Rulemaking (filed June 23, 1989), CNS Opposition to Motion for Commission Decision (filed January 4, 1990), and CNS Comments to Order Inviting Comments to Supplement the Record (filed November 22, 1991) submitted in RM-6723; CNS Comments (filed August 15, 1991) and CNS Reply Comments (filed September 16, 1991) in Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115.

[4] See "Capital Network System, Inc.'s Response to Bell Atlantic's Motion for Further Order Concerning Billed Party Preference," United States v. Western Elec. Co., Inc., No. 82-0192 (D.D.C. filed November 19, 1991).

higher rates to the public -- while providing little or no real public benefit. Furthermore, implementation of a billed party preference system would have the effect of preventing CNS and other regional operator service providers ("OSPs") from competing successfully for the opportunity to provide operator services to many aggregators and to many members of the public. The resulting remonopolization or "oligopolization" of the "0+" market -- as well as the "1+" market -- would be profoundly anticompetitive and contrary to the public interest.

4. In addition to its severe anti-consumer and anticompetitive impact, implementation of billed party preference is unnecessary and unlawful. It is unnecessary because, regardless of the presubscribed IXC, callers can always access their preferred IXC easily by dialing "800" or "950," and often by dialling a "10XXX" code. As a result, there is simply no need for billed party preference. In view of the already known exorbitant costs and negligible benefits, an FCC requirement that billed party preference be implemented would be arbitrary and capricious agency action that violates the Administrative Procedure Act. Such action would also be directly contrary to the Administration's program to reduce unnecessary and costly federal regulation.

II. "800," "950," AND "10XXX" ACCESS MAKE BILLED PARTY PREFERENCE UNNECESSARY

5. As a result of the Commission's actions taken in CC Docket No. 91-35, [5] callers can now reach their preferred IXCs -- even American Telephone & Telegraph Company ("AT&T") [6] -- by dialing an "800" or "950" number. Moreover, given the Commission's recent News Release announcing the reimposition of 10XXX unblocking deadlines, [7] callers will have yet another, universally available method to reach their preferred carrier. Thus, billed party preference is simply unnecessary because callers already have the ability to reach their preferred carriers easily at any time from any location -- if that is what they want. [8]

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[5] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 6 FCC Rcd 4736, 4744 (1991), petitions for recon. and court appeals pending; 47 C.F.R. § 64.704(d).

[6] Because of the Commission's decision in CC Docket No. 91-35, AT&T has established an "800" access number. However, in violation of the spirit, if not the letter, of the Commission's requirement, AT&T refuses to promote, advertise or make readily available its "800" number. Moreover, AT&T prevents callers to its "800" number from receiving direct access to the network by forcing them to select options from a menu and then telling them to hang up and dial "10288" to complete their calls. As a result, AT&T has yet to comply fully with the FCC's intent when it required AT&T to provide "800" or "950" access. The solution to AT&T's evasive tactics is, at least, to require AT&T to publicize its "800" access number and to require it to connect "800" access calls automatically to its network, not to impose billed party preference.

[7] "LECs Required to Offer Blocking and Screening Services to Control Potentially Fraudulent 10XXX Calling; Certain Unblocking Deadlines Deferred," Report No. DC-2144 (released June 25, 1992).

[8] In contrast, none of the billed party preference systems proposed to date would be universally available as they would not be effective for calls placed from non-equal access locations.

6. In contrast to "800," "950" and "10XXX" access, a billed party preference system would result in substantial delays and inconvenience for callers placing interexchange collect, third-party billed, and credit card calls. Under this system, callers placing interexchange collect, third-party billed, or credit card calls must first be connected to a LEC operator. After determining the preferred IXC for the call, the LEC operator would then have to transfer the call to the appropriate IXC operator for completion. The delays and additional costs associated with two separate operators placing a single call will be substantial, counterproductive, and unnecessary. As a result, billed party preference will significantly increase the connection time for interexchange collect, third-party billed, and credit card calls. Because these calls are a substantial part of the operator services market (e.g., approximately 68% of CNS's traffic involves these types of calls that require live operator assistance), billed party preference will greatly inconvenience most operator service customers.

III. A DECISION BY THE FCC TO REQUIRE BILLED PARTY PREFERENCE WOULD BE ARBITRARY AND CAPRICIOUS

7. The substantial record on billed party preference already before the Commission shows that implementation would be extremely costly to LECs and IXCs alike. These costs would inevitably be passed on to customers in the form of higher rates, slower call completion time, and decreased network reliability. In return for these enormous costs, there would be virtually no real customer benefit because "800" and "950" access (as well as

increasingly available "10XXX" access) already allows callers to select their preferred carrier. [9] Implementing billed party preference despite this evidence and despite having just required aggregators to incur substantial costs to comply with "10XXX" unblocking would be arbitrary and capricious. Such implementation would also be inconsistent with President Bush's directive that detailed cost/benefit analyses be performed for major proposed regulations and that such analyses show that the benefits clearly outweigh the costs before adopting proposed regulations. [10]

8. As LECs and IXCs have already informed the Commission, billed party preference will require enormous capital outlays and cannot be implemented in the near future. In 1990, Bell Atlantic estimated the cost of implementing a LIDB-based system of billed party preference would exceed $150 million for just the Bell and General Telephone companies. [11] This estimate does not,

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9/ One of the purported benefits of billed party preference is that the billed party, rather than the caller, will be able to determine which carrier should carry the call. In CNS's experience, the billed party (or an employee of the billed party) already selects the carrier because the caller is generally also the billed party -- either through calls charged directly to the customer's calling or credit card or calls charged either collect or third-party billed to the customer's home or business telephone number. Those very few calls where the billed party may have selected a different carrier than the calling party do not begin to justify the extraordinary expense necessary to implement billed party preference.

10/ See infra Section V for a further discussion of the Administration's regulatory reform policies.

11/ See Bell Atlantic's Motion for Commission Decision submitted in RM-6723 (filed November 26, 1990) at 4 n.12.

however, include the implementation costs to small, independent LECs, many of whom might not be able to afford the costly software necessary to implement billed party preference. AT&T has estimated that the costs of such a system would be more than $560 million. [12] Moreover, one Bell Operating Company ("BOC") recently estimated that it would take until 1996 -- at the earliest -- to implement billed party preference. [13] By the time billed party preference could actually be implemented, the costs will be likely to have increased even more.

9. The costs of implementing billed party preference would not be limited just to LECs. Every IXC whose calling cards are not in either card issuer identifier ("CIID") or 891 formats will have to reissue its cards if they are to be usable on a "0+" basis with billed party preference. [14] Sprint recently estimated that reissuing its calling cards in a new format would cost $20 million. [15]

10. Implementation of billed party preference would require significant network and switch rearrangements, additional

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[12] Notice, 7 FCC Rcd at 3031.

[13] 92-77, Part 1 Comments of US West Communications, Inc. ("US West") at 5. Another BOC estimated that Signaling System Seven, a prerequisite for billed party preference, will not be available in all of its end offices until 1995 or 1996. See 92-77, Part 1 Comments of the Nynex Telephone Companies ("Nynex") at 3 n.3.

[14] 92-77, Part 1 Comments of Southwestern Bell Telephone Company at 6.

[15] 92-77, Part 1 Sprint Comments at 10.

trunking facilities, and increased number of operators. [16] The quality of service provided to the public would be lower because of increased call processing time. [17] Currently, collect, third-party billed, and credit card calls can be promptly and directly connected to the appropriate presubscribed carrier. As discussed above, under a billed party preference system, however, the intervention of two live operators will now be required -- needlessly delaying call completion time and increasing costs. This is because when callers fail to provide a calling card number, their calls would be automatically defaulted to a LEC operator who, in turn, must obtain information and transfer the call to an IXC operator for completion. The need for this extra operator will lengthen call processing time substantially and will in effect add a charge for an "0-" transfer to every collect, third party billed, and credit card call.

11. The costs to consumers and businesses from these additional FCC-required changes will be enormous. The public makes approximately 3.1 billion interexchange operator service calls each year. [18] Assuming that about 50% of these calls

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[16] 91-115 Nynex Comments at 5-6.

[17] 91-115 US West Comments at 11.

[18] AT&T has reported to the FCC that it handled 1.32 billion operator calls for the six months ending January 31, 1992 (i.e., approximately 2.64 billion calls per year). See AT&T's Complaint Report at 3, CC Docket No. 90-313 (filed on March 23, 1992). The Commission has assumed that AT&T is the presubscribed OSP for roughly 75% of operator service calls. Notice, 7 FCC Rcd at 3030 n. 25. Because AT&T handles a disproportionate amount of "dial around" traffic, CNS estimates that AT&T handles about 85% of all (continued...)

would require the use of a live operator if billed party preference were adopted by the Commission, [19] then 1.55 billion interexchange calls a year would be required to be transferred by LEC operators to IXC operators because of billed party preference. Because of the special circuits that would be required to connect OSPs and the LECs, together with the Signalling System Seven ("SS7"), LIDB costs and other fees for determining how to route these calls, the per call costs for OSPs are likely to be much higher than the average $0.35 per call "0-" LEC transfer fee currently charged by LECs for their "0-" transfer services. [20] Nevertheless, even assuming that the LECs' fees would be only $0.35 per call, this means that an FCC-mandated billed party preference system would require the "0-" transfer of 1.55 billion calls, thereby forcing consumers to pay directly or indirectly $542 million <u>each</u> <u>year</u> for these

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18/ (...continued)
interexchange operator service traffic. As a result, if AT&T's 85% share of the market is 2.64 billion calls, then the total number of interexchange operator-assisted calls would be approximately 3 billion per year:

$$\frac{.85\ (\text{i.e., AT\&T's market share})}{2.64\ \text{billion calls}} = 3.1\ \text{billion total calls.}$$

19/ CNS's traffic studies show that approximately 68% of its calling volume involves collect, third-party billed, or credit card calls and therefore would require the intervention of a LEC operator under a billed party preference system. To be conservative, CNS has estimated that, for all OSPs, only 50% of interexchange operator-assisted calls would require a LEC operator to transfer the call to the appropriate IXC.

20/ <u>See</u> <u>Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation</u>, Second Report and Order, FCC 92-170, CC Docket No. 91-35 (released May 8, 1992) at para. 36 ("<u>91-35 Second Report and Order</u>").

unnecessary services. This massive cost increase -- caused solely by new FCC-mandated regulations -- is simply unnecessary and counterproductive.

12. In addition to the substantial costs, there are many technical difficulties associated with the implementation of a billed party preference system. [21/] Because billed party preference relies upon SS7 technology, network reliability issues may also arise. Under current dialing patterns, cardholders can dial "800" or "950" access numbers and bypass LEC networks. Under billed party preference, however, calls must be routed through the LECs and local network difficulties could prevent some "0+" calls from being completed that otherwise could have been properly routed under the current system. Given the past fragility of SS7 technology and the increasing demands for its usage, the Commission should avoid introducing another possible point of system failure.

13. If billed party preference is implemented, otherwise unnecessary LEC and IXC costs would inevitably be passed along to the calling public in the form of higher rates, [22/] while not providing any real improvement in service to the public. Indeed, given the possibility of increased call processing time and

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[21/] Even Sprint, a staunch proponent of billed party preference, acknowledges that "it will take time to sort out the technical details of how billed party preference should work." "Opposition of Sprint to Motion of Bell Atlantic," United States v. Western Elec. Co., Inc., No. 82-0192, at 7 (D.D.C. filed November 15, 1991).

[22/] See 91-115 US West Comments, Appendix B at 3.

decreased network reliability, billed party preference could actually worsen "0+" interLATA service substantially. In view of this evidence, the Commission cannot lawfully implement billed party preference because such a decision would be arbitrary and capricious. [23/]

14. Indeed, implementation of billed party preference would be particularly arbitrary and capricious now because of the Commission's recent decision reaffirming its requirement that aggregators incur substantial costs to unblock "10XXX" access. As a result of its decisions in CC Docket No. 91-35, the Commission is requiring aggregators to spend huge sums of money to replace otherwise valuable telecommunications equipment simply because that equipment cannot selectively process "10XXX" calls. Once aggregators have replaced their equipment (currently required by the FCC to be done by mid-1997), the Commission proposes to implement an access method for operator-assisted calls that does not rely upon "10XXX" access at all and that would have worked perfectly well with aggregators' old equipment. The expenditure of millions of dollars in new capital investment would be rendered useless. Such arbitrary and capricious decision-making cannot be the product of reasoned analysis and must be rejected.

[23/] See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (agency action violates the Administrative Procedure Act if its decision runs counter to the evidence before the agency); Greater Boston Television v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971).

IV. A DECISION BY THE FCC TO MANDATE BILLED PARTY PREFERENCE COULD BE AN UNCONSTITUTIONAL TAKING

15. The "Takings Clause" of the Fifth Amendment to the United States Constitution prohibits the Federal government from taking "private property . . . for public use, without just compensation." [24] There should be no doubt but that the ownership of valuable telecommunications equipment is a property interest protected by the Fifth Amendment [25] and that the proposed use of aggregator equipment associated with billed party preference constitutes public use of that equipment. [26] Thus, for a system of billed party preference not to be an unconstitutional "taking" in violation of the Fifth Amendment, aggregators and private payphone owners ("PPOs") should be compensated for "0+" calls completed under a billed party preference system.

16. Under the Commission's proposed system of billed party preference, aggregators and PPOs would be required to implement billed party preference and they would be prohibited from

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[24] U.S. Const. amend. V.

[25] Courts have broadly interpreted the definition of a property interest. See, e.g., Andrus v. Allard, 444 U.S. 51, 65 (1979) (1979) (artifacts made from protected birds assumed to be "traditional property right"); Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) (materialman's lien established by Maine law held to be property interest); Lynch v. United States, 292 U.S. 571, 579 (1934) (insurance contract held to constitute a property interest).

[26] In fact, if the proposed rules were not for public use, then the government's proposed taking would be unlawful, whether or not compensation were paid. See Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937).

programming their telephones to "dial around" to avoid billed party preference carriers for "0+" calls. [27] Such action would render the investment by many aggregators and PPOs in their equipment virtually worthless because it would functionally eliminate the likelihood of their receiving compensation from the carriers handling the interexchange traffic. [28] In determining whether the Commission's current billed party preference proposal constitutes a "taking," the Commission must employ an "ad hoc, factual" three-part inquiry [29] focusing on (1) "'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" [30]

17. With respect to the first factor, the Commission's proposed system would have a devastating and definite economic impact on many aggregators and PPOs because it would deprive them of their realistic ability to be compensated fairly for FCC-mandated, public use of their costly telecommunications

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[27] Notice, 7 FCC Rcd at 3032.

[28] Property need not be rendered absolutely valueless for there to be a taking requiring compensation. See Pennsylvania Coal v. Mahon, 260 U.S. 393, 414 (1922) ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.")

[29] Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224 (1986).

[30] Id. (quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

equipment. This uncompensated usage would be an especially difficult burden for many small businesses to bear. As for the second factor, CNS believes that when many aggregators and PPOs purchased their equipment, they did so with the distinct investment-backed expectation that commissions from the use of the equipment would justify their costly, long-term investment. Until the release of this Notice, there was no reason to suspect that the Commission would not institute a mechanism to compensate aggregators and PPOs for the use of their equipment and for the loss of commission income from the equipment. [31/] Thus, the Commission's proposed implementation of billed party preference could, if adopted, be viewed as seriously interfering with the reasonable, investment-backed expectations of aggregators and PPOs.

18. The third factor used to evaluate whether there has been a "taking" is the "character of the governmental action." Because the proposed governmental action in this proceeding would have the effect of depriving aggregators of much of the economic value of their equipment, such action certainly could be considered to be a taking subject to the Fifth Amendment's compensation requirement. [32/] In light of the risks associated

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[31/] Indeed, given the Commission's establishment of a compensation system for "800" and "950" access calls there was every reason to believe that the Commission would establish a compensation system here as well. See 91-35 Second Report and Order (establishing a compensation system for private payphone owners).

[32/] See United States v. General Motors, 323 U.S. 373, 378 (1945).

with this proposal, [33] it seems clear that the Commission should decide not to implement billed party preference and should instead rely upon "800," "950, and "10XXX" access and declare "0+" access to be in the public domain. [34] Such an approach would eliminate these very serious Fifth Amendment-related issues and would clearly be in the public interest.

19. Moreover, this approach would comport much more closely with the spirit of Executive Order 12,630 ("Government Actions and Interference with Constitutionally Protected Property Rights") that requires "Federal Departments and Agencies" to review regulatory policies and actions to prevent unnecessary takings. The Executive Order mandates that federal agencies have "due regard for the constitutional protections provided by the Fifth Amendment." [35] While the Executive Order may not be directly controlling on independent regulatory agencies such as the Commission, it does evidence the Administration's intent to make federal agencies consider more carefully the impact of their actions on private property and private investment.

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[33] See Greater Worcester Cablevision, Inc. v. Carabetta Enterprises, Inc., 682 F. Supp. 1244 (D. Mass. 1985) (Massachusetts statute which required a landlord to permit installation of cable equipment on property but made no provision for compensation is unconstitutional).

[34] See e.g., CNS 92-77, Part 1 Comments and Reply Comments.

[35] Exec. Order No. 12,630, 3 C.F.R. 554, 555 (1988), reprinted in 5 U.S.C. 601 (1988).

V. IMPLEMENTING BILLED PARTY PREFERENCE WOULD BE INCONSISTENT WITH THE ADMINISTRATION'S RECENT INITIATIVES AGAINST UNNECESSARY REGULATION

20. Billed party preference should not be implemented because it is fundamentally inconsistent with the Administration's fight against unnecessary regulation and is completely incompatible with actions taken by the FCC in response to the President's initiatives. On January 28, 1992, President Bush announced a 90-day review period for agencies to "weed out unnecessary and burdensome government regulations, which impose needless costs on consumers and substantially impede economic growth" and to report on their progress at the end of the period. [36] In order for agencies to devote maximum effort to their reviews, the President imposed a moratorium on new regulations during that period. [37] Rather than eliminate burdensome regulations, the Commission now proposes to create a very substantial new one. As described above, billed party preference would both impose needless costs on consumers and substantially impede economic growth because of the increased costs.

21. Not only would billed party preference be inconsistent with Administration policy, but its implementation would contradict the FCC's own policies. In its Report to the

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[36] President's Memorandum on Reducing the Burden of Government Regulation, 28 Weekly Comp. Pres. Doc. 232-33 (Feb. 17, 1992).

[37] Id. at 233. On April 29, 1992, the President extended the review period and moratorium for 120 days. See President's Memorandum on Implementing Regulatory Reforms, 28 Weekly Comp. Pres. Doc. 728-29 (May 4, 1992).

President describing its regulatory reform process, the FCC included among its "solid record of accomplishment[s]" the creation of a Small Business Advisory Committee to "facilitate new entry and entrepreneurship in the telecommunications industry." [38/] As described in Section VI below, rather than attracting new entry and entrepreneurship into the OSP market, implementation of billed party preference could, in fact, eliminate an entire class of small businesses from the telecommunications industry -- the regional OSPs who have consistently been the most innovative carriers in the OSP market.

22. Furthermore, the FCC admitted in its Report that it had not used cost/benefit analyses in the past but pledged that "in the future the Chairman will direct that rigorous cost/benefit or economic impact analyses be prepared for major decisions that come before the Commission." [39/] A proposal, such as billed party preference, whose implementation costs and annual recurring costs both exceed $500 million, must be considered a major decision and must be subjected to a rigorous cost/benefit analysis by the Commission. Under such an analysis, billed party preference must be rejected as inconsistent with the President's and the FCC's recent initiatives to prevent excessive regulatory costs from being imposed on American consumers and businesses.

38/ Report of the Federal Communications Commission Regarding the President's Regulatory Reform Program at ii-iii (released April 28, 1992) ("Report").

39/ Id. at 33 (emphasis added).

VI. IMPLEMENTING BILLED PARTY PREFERENCE COULD HAVE A DEVASTATING IMPACT ON THE COMPETITIVE "0+" MARKET

23. Implementation of billed party preference system would be profoundly anticompetitive because it likely would force out of the market those companies that have focused primarily on operator services. [40/] This is because independent OSPs often do not offer substantial "1+" services or calling cards and therefore -- unlike MCI Communications Corporation ("MCI") and Sprint -- would not be able to rely on an entrenched base of existing presubscribed "1+" customers to presubscribe to their "0+" services.

24. In its Notice, the Commission proposes to have LECs send ballots to their subscribers to select an "0+" carrier. Customers who do not respond would be defaulted to their "1+" carrier. [41/] As recognized by a major LEC, customers have "a remarkably low response rate" to balloting procedures -- typically less than 60% -- even when they involve the important and well understood choice of a "1+" carrier. [42/] Most end users, however, will not understand the need for, and perhaps even resent, another complex, government-mandated balloting procedure for choosing a "0+" carrier. As a result, customer response rates for "0+" balloting are likely to be much lower

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40/ See CNS's Opposition to Bell Atlantic's Motion for Commission Decision (filed on January 4, 1991) at 6-7.

41/ Notice, 7 FCC Rcd at 3032.

42/ See 91-115 Supplemental Comments of GTE Service Corporation (filed June 10, 1992) at 7.

than for "1+". Thus, the Commission's proposed regulations would have the effect of artificially eliminating the ability of OSPs to compete successfully with "1+" carriers (who will likely receive virtually all 0+ traffic because they would be the "default" choice), and therefore could eliminate the separate OSP market itself. The FCC's alternative proposal, notification of a customer's right to a different "0+" carrier without any set procedure for selecting an "0+" carrier, [43] could not effectively advise customers of their rights to select a carrier and would likely confuse customers into taking no action. Both proposed implementation methods would simply ensure that the vast majority of calling card customers would merely be defaulted to their "1+" carrier for their "0+" traffic.

25. Importantly, billed party preference would exclude from the emerging marketplace those small carriers that have focused on serving the operator service market and have been the most innovative service providers in that market. In contrast to many large carriers that have been eliminating jobs, small carriers such as CNS have been creating many new jobs. This is consistent with the fact that, as the President recently acknowledged, small businesses account for more than two-thirds of all new jobs. [44] By implementing billed party preference, the Commission would not only eliminate innovative small interexchange competitors at a

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[43] Notice, 7 FCC Rcd at 3032.

[44] See Fact Sheet on the President's Regulatory Reform Initiative at 4 (released April 29, 1992).

critical stage of marketplace development and national economic recovery, but also would, in essence, eliminate the separate operator services market and make it once again merely a part of the "1+" market. Such a result would be anticompetitive and contrary to the public interest.

26. Only those nationwide "1+" carriers, such as MCI and Sprint, that hope to enhance their relatively smaller share of the "0+" market by leveraging their relatively more substantial market share of the "1+" market, and those LECs that would operate the system and who do not want to lose revenue to competitive carriers, would benefit from a billed party preference system. For interLATA calls, customers of primarily "1+" carriers such as MCI and Sprint would probably become -- by default -- their "0+" customers as well. Even if customers were offered a choice of "0+" carriers, however, only the largest carriers would have the resources necessary to issue calling cards and promote their use nationally. As a result, the choice of "0+" carriers would likely be limited to carriers offering nationwide access.

27. The proposal to permit a "primary" OSP to designate one or more secondary OSPs [45] raises substantial implementation and competitive issues that would be very difficult to resolve. Unlike LECs, OSPs compete against one another in overlapping territories, making the prospects for "partnership agreements" between them extremely unlikely. Moreover, because calling card

[45] See Notice, 7 FCC Rcd at 3033.

services are used primarily by the traveling public, cardholders would be unlikely to select a multi-OSP system over a one OSP system because of their perception that such a system would be more inconvenient to use. This, of course, would make it difficult -- if not impossible -- for regional carriers to compete and would likely result in the emerging, competitive operator services industry being doomed. At best, the operator services industry would be relegated to an oligopolistic appendage of the "Big Three" carriers that have access facilities in virtually every market in the United States.

28. A billed party preference system would probably also be devastating for smaller regional "1+" carriers. This is because in order to compete with large carriers such as AT&T, smaller regional "1+" carriers have begun to install new equipment that allows them to provide operator services to their customers by connecting their networks to independent OSPs. This capability allows these smaller carriers to compete more successfully with AT&T because they can provide a broader range of services. However, as a practical matter because AT&T, MCI and Sprint are the only "1+" carriers with ubiquitous -- or nearly ubiquitous -- access facilities, an FCC-mandated billed party preference system would make it virtually impossible for regional "1+" carriers to continue to offer operator services. As with competing OSPs, it is extremely unlikely that competing "1+" carriers would join "partnership agreements" to route "0+" traffic to these competing regional carriers. As a result, regional "1+" carriers would no